

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

COVETRUS, INC. and)	
VETERINARY DATA SERVICES, INC.,)	
)	
Plaintiffs)	CASE NO. 2:21-cv-00097-LEW
)	
v.)	
)	
ACTIAN CORPORATION,)	
)	
Defendant)	
)	

**PLAINTIFFS’ LOC. R. 56(B) STATEMENT OF MATERIAL FACTS IN SUPPORT OF
MOTION TO REFER UNDER SECTION 17 U.S.C. § 411(B)(2)
PURSUANT TO THE COURT’S DECEMBER 2, 2022 ORDER**

Pursuant to the District of Maine’s Local Rule 56 and the Court’s December 2, 2022 Order (Dkt. 184), Plaintiffs Covetrus, Inc. (“Covetrus”) and Veterinary Data Services, Inc. (“VDS”) file this Statement of Material Facts in support of Plaintiffs’ Motion to Refer Under Section 17 U.S.C. § 411(B)(2)

Action Pleaded Copyright Infringement Based on the Basic Registrations

1. Actian’s copyright infringement claim alleges the unlicensed use of DataConnect, Version 9.2.7.10 also referred to as Data Integrator, or DI (the “Software”). Dkt. 91 (Actian’s Second Amended Counterclaims) at ¶ 11. Actian alleges that Version 9.2.7.10 of the Software is covered by U.S. Copyright Registration TX0008902355 for DI 9.x Engine and TX0008902344 for DI 9.x UI (together, the “Basic Registrations”). *Id.*

2. The Basic Registrations have not been withdrawn from the Copyright Office.

3. The Basic Registrations have not been withdrawn from this case. Ex D to this Motion (Excerpt of Actian’s July 1, 2022 Supplemental Responses to Interrogatories Nos. 1-30) at ROG 11.

The Copyright Office Notified Action of Inaccuracies in the Deposit

4. When Actian applied to register DI 9.x Engine and DI 9.x UI in 2020, it represented to the Copyright Office that the computer programs were “published” and “original works.” Dkt. 170-3 (DI 9.x Engine Registration) at 2; Dkt. 170-4 (DI 9.x UI Registration) at 2.

5. Actian submitted a source code deposit in connection with its applications to register DI 9.x UI and DI 9.x Engine. Dkt. 170-12 at ACTIAN_003986; Dkt. 170-13 at ACTIAN_003989.

6. Information in the Basic Registrations indicate that Actian intended to submit a source code deposit consisting of computer programs first published on November 30, 2007. Dkt. 170-3 (DI 9.x Engine Registration) at 2; Dkt. 170-4 (DI 9.x UI Registration) at 2.

7. Version 9.0 of the Software was first shipped in November 2007. Dkt. 170-10 at ACTIAN_004508 (Chart of DI versions showing v. 9.0 first shipped November 2007).

8. By emails dated October 1, 2020, the Copyright Office Examiner notified Actian’s counsel of concerns with the source code deposits, stating that it was “unclear whether we received source code from the correct computer program.” Dkt. 170-12 at ACTIAN_003986-87; Dkt. 170-13 at ACTIAN_003989-90.

9. As to the DI 9.x Engine application, the Examiner noted the deposit “contains copyright notices with the dates (C) 1996-2001 and (C) 2002,” contains the name “Data Junction Corp.” and states “THIS IS UNPUBLISHED PROPRIETARY SOFTWARE CODE.” Dkt. 170-12 at ACTIAN_003986-87.

10. The Examiner further stated that the source code deposit for DI 9.x Engine was “at odds with [Actian’s] assertion that [it] want[s] to register a published 2007 program authored by

Pervasive Software, Inc. and owned by Actian Corporation.” Dkt. 170-12 at ACTIAN_003986-87.

11. As to the DI 9.x UI application, the Examiner noted that the deposit contained “copyright notices with dates preceding 2007 and name other . . . authors and copyright claimants.” Dkt. 170-13 at ACTIAN_003989-90.

12. The Examiner further stated that the DI 9.x UI deposit was “at odds” with Actian’s application. Dkt. 170-13 at ACTIAN_003989-90;

13. In response to the Examiner’s inquiries, Actian submitted new source code deposits for each application. Dkt. 170-12 (Ex. 12 to Plaintiff’s Mot. to Refer) at ACTIAN_003986; Dkt. 170-13 at ACTIAN_003989.

14. By email dated October 8, 2020, Actian represented to the Examiner “that the code now submitted contains new material published in November 2007.” Dkt. 170-12 at ACTIAN_003986; Dkt. 170-13 at ACTIAN_003989.

15. The Basic Registrations were filed on September 28, 2020 and issued on October 13, 2020. Dkt. 170-3 (DI 9.x Engine Registration) at 1–2; Dkt. 170-4 (DI 9.x UI Registration) at 1–2.

The Source Code Deposits Do Not Match the Registrations

16. Actian designated Kathryn Van Dyken (“Ms. Van Dyken”) as its corporate representative under F.R.C.P 30(b)(6) on the topic of “Actian’s copyright filings and deposits of source code for those filings for the copyright registrations listed in its pleadings...” and “[d]ifferences between any code subject to any registration filed with the Copyright Office for Data Integrator 9.2 . . . including the date the code deposited with the Copyright Office was created, modified and printed.” Dkt. 174-7 (Van Dyken Depo Tr. at 10:25-12:5).

17. Ms. Van Dyken testified that she provided the code used in the deposits:

“Q: Okay. And did you provide information that was used to apply for copyright registrations back in the fall of 2020?

A: Yes.

Q: Did you provide code that was used for the copyright applications back in the fall of 2020?

A: Yes.”

Dkt. 174-7 (Van Dyken Tr.) at 70:14–17; *see also* 10:21–12:05, 70:14–71:19, 73:13-14; 76:06–25, 78:11–18, 80:22–81:20, 107:18–19.

18. Ms. Van Dyken testified that the deposits were assembled from code from Version 9.3.0 of the Software, which was never released publicly:

“Q: So the code that you used that we discussed earlier where you ran the Java script on, that was actually the 9.3.0 branch, right?

A: It was, yes.

Q: That version was never released publicly?

A: Never released publicly.”

Dkt. 174-7 (Van Dyken Tr.) at 81:10–15; *see also* 10:21–12:05, 70:14–71:19, 76:06–25, 78:11–18, 80:22–81:20, 107:18–19).

19. Ms. Van Dyken testified that the Software Versions are cumulative and that Actian “do[esn’t] remove code.” Dkt. 174-7 (Van Dyken Tr.) at 82:2–8; *see also* 98:3–7 (“I mean, like I said, our releases are cumulative. I mean, they just build upon each other. . . . We can’t – we don’t remove anything.”).

20. In particular, Ms. Van Dyken testified that the deposit for 9.x UI was created from a 9.3 branch of the source code repository for DI and that the deposit for 9.x Engine was created using the same method.

“Q: What is this?

A: This is 9.x UI.

Q: Is this the source code deposit that accompanied the copyright registration?

A: It looks like it.

Q: Is this the document that you prepared using the process we discussed earlier?

A: Yes.”

Dkt. 174-7 (Van Dyken Tr.) at 91:1–8; *see also* 90:21–92:20, 118:04–25.

21. Ms. Van Dyken testified that the 9.3 branch of the source code repository for DI included earlier branches, such as the 9.2 branch:

Q: And you said just give me the latest, which happened to be 9.3.0, right?

A: It was the branch 9.3. We call them all branches. There would have been a branch 9.3, 9.2, 9.1, 9.0.

Q: And aside from checking JIRA – that’s J-I-R-A – you didn’t ask the CVS server to list the changes, if any, between 9.2.7 and 9.3, fair?

A: Fair.

Dkt. 174-7 (Van Dyken Tr.) at 86:3–11; *see also* 70:14–76:01, 81:10–20, 84:16–86:11.

22. Ms. Van Dyken testified that she then wrote a program to pull all the file names regardless of their directory, filtered out non-code, sorted the files alphabetically from A to Z, and chose whatever came up in the first 25 pages and the last 25 pages of code to create the deposit PDFs (after which redactions were added):

Q: So you just pulled all the file names regardless of their directory and whatever comes up first in an alphabetical sort, that’s the first 25 pages, whatever comes up last, the bottom of that file is the last 25 pages, is that right?

A: That's correct.

Dkt. 174-7 (Van Dyken Tr.) at 75:18–23; *see also* 70:14–76:01, 81:10–20, 84:16–86:11

23. Ms. Van Dyken testified that, after she was informed that the initial deposits she created would not work for the copyright applications, she refined her initial search by doing “keyword search[es]” for a 2007 copyright date in the code – but also “added some 2006” because she “believe[s] there wasn’t enough in the 2007.” Dkt. 174-7 (Van Dyken Tr.) at 167:01–169:12, 170:16–171:08.

Action Disclosed Supplemental Registrations at the Close of Discovery

24. During this lawsuit, Actian sought to fix errors in its Basic Registrations by filing for supplementary registrations. *See* Dkt. 172-5 (Actian’s Responses to Plaintiff’s Fourth and Fifth Set of ROGs) at Response to ROG No. 25; Dkt. 172-3 (DI 9.x UI Supplementary Registration) at 2; D172-2 (DI 9.x Engine Supplementary Registration) at 2; Dkt. 177 (Actian Opposition to Plaintiff’s Motion to Exclude) at 1 (“In opposition [to Plaintiff’s Mot. to Refer], Actian explained that it would be correcting any errors by obtaining supplementary registrations.”).

25. Actian sought to fix the title, publication date, and year of completion of its Basic Registrations:

Explanation of Corrections:	Title: The work was titled DataIntegrator 9.x UI. Correction: The title has been changed to reflect the correct version from 9.x to 9.3.0.9. Publication/Completion: (1) The work was identified as published on November 30, 2007. Correction: The work has not been published, so publication has not been selected and the publication date has been removed. (2) The Year of Completion was identified as 2007. Correction: The work was created from 2007 to 2013. The year of creation (completion) has been changed to 2013.
Explanation of Amplifications:	Limitations of Claim: The work excluded "computer program, artwork." Amplification: The work excludes third party code and artwork.

Dkt. 172-3 (DI 9.x UI Supplementary Registration) at 2.

Explanation of Corrections:	Title: The work was titled DataIntegrator 9.x Engine. Correction: The title has been changed to reflect the correct version from 9.x to 9.3.0.9. Publication/Completion: (1) The work was identified as published on November 30, 2007. Correction: The work has not been published, so publication has not been selected and the publication date has been removed. (2) The Year of Completion was identified as 2007. Correction: The work was created from 2007 to 2013. The year of creation (completion) has been changed to 2013.
Explanation of Amplifications:	Limitations of Claim: The work excluded "computer program." Amplification: The work excludes third party code.

Dkt. 172-2 (DI 9.x Engine Supplementary Registration) at 2.

26. Actian also sought to amplify its Basic Registrations. Dkt. 172-3 (DI 9.x UI Supplementary Registration) at 2; Dkt. 172-2 (DI 9.x Engine Supplementary Registration) at 2.

27. Supplemental Registration No. TXu 2-323-327 was issued July 1, 2022, based on an application filed June 21, 2022, for DI 9.3.0.9 Engine. Dkt. 172-2 (DI 9.x Engine Supplementary Registration) at 1–2.

28. Supplemental Registration No. TXu 2-232-147 was issued on June 24, 2022, based on an application filed June 21, 2022 for DI 9.3.0.9 UI. Dkt. 172-3 (DI 9.x UI Supplementary Registration) at 1–2.

29. Actian's Second Amended Counterclaim does not plead infringement of the Supplementary Registrations, nor does any other pleading or document filed in this case, prior to July 1, 2022. *See* Dkt. 91.

30. Actian produced the Supplementary Registrations for the first time on the evening of July 1, 2022. Dkt. 172 (Plaintiffs' Mot. to Exclude) at 2-3; Dkt. 177 (Actian Opp. to Plaintiff's Mot. to Exclude) at 1–2.

Differences Between the Basic Registrations and the Supplemental Registrations

31. The Basic Registrations are certificates for computer programs titled DataIntegrator 9.x UI (Copyright Registration No. TX 8-902-344) and DataIntegrator 9.x Engine (Copyright

Registration No. TX 8-902-355). Dkt. 170-3 (DI 9.x Engine Registration) at 2; Dkt. 170-4 (DI 9.x UI Registration) at 2.

32. The Supplemental Registrations are certificates for computer programs titled 9.3.0.9 UI (Supplemental Registration No. TXu 2-322-147) and 9.3.0.9 Engine (Supplemental Registration No. TXu 2-323-327). Dkt. 172-3 (DI 9.x UI Supplementary Registration) at 2; Dkt. 172-2 (DI 9.x Engine Supplementary Registration) at 2.

33. The information in the Supplemental Registrations indicate that Actian intended to “correct [the] version from 9.x to 9.3.0.9.” Dkt. 172-3 (DI 9.x UI Supplementary Registration) at 2; Dkt. 172-2 (DI 9.x Engine Supplementary Registration) at 2.

34. The Basic Registrations state that the computer programs were completed in 2007. Dkt. 170-3 (DI 9.x Engine Registration) at 2; Dkt. 170-4 (DI 9.x UI Registration) at 2.

35. The Supplemental Registrations state that the computer programs were created from 2007-2013, and changed the year of “Completion” to 2013. Dkt. 172-3 (DI 9.x UI Supplementary Registration) at 2; Dkt. 172-2 (DI 9.x Engine Supplementary Registration) at 2.

36. The Basic Registrations state that the computer programs were first published on November 30, 2007. Dkt. 170-3 (DI 9.x Engine Registration) at 2; Dkt. 170-4 (DI 9.x UI Registration) at 2.

37. The Supplemental Registrations state that the computer programs are “unpublished.” Dkt. 172-3 (DI 9.x UI Supplementary Registration) at 2; Dkt. 172-2 (DI 9.x Engine Supplementary Registration) at 2.

38. The Supplemental Registrations remove the publication date. Dkt. 172-3 (DI 9.x UI Supplementary Registration) at 2; Dkt. 172-2 (DI 9.x Engine Supplementary Registration) at 2.

39. The Basic Registration for DI 9.x UI excludes “computer program, artwork.” Dkt. 170-4 (DI 9.x UI Registration) at 2.

40. The Supplemental Registration for DI 9.3.0.9 UI excludes only “third-party code and artwork.” Dkt. 172-3 (DI 9.x UI Supplementary Registration) at 2.

41. The Basic Registration for DI 9.x Engine excludes “computer program.” Dkt. 170-3 (DI 9.x Engine Registration) at 2.

42. The Supplemental Registration for DI 9.3.0.9x Engine excludes only “third party code.” Dkt. 172-2 (DI 9.x Engine Supplementary Registration) at 2.

43. Actian’s interrogatory responses of July 1, 2022 confirm that Actian intended to exclude only third-party code and artwork in the Supplementary Registrations:

INTERROGATORY NO. 26:

Describe with particularity the original material Actian contends is covered by the copyright registrations you claim are infringed, including the “[n]ew material included in claim” identified in the registrations.

RESPONSE:

Actian objects to this Interrogatory as disproportionate to the needs of this case and unduly burdensome and irrelevant. Actian further objects to the Interrogatory to the extent it calls for attorney-client privileged and workproduct information.

Pursuant to Rule 33(d), Actian identifies all of the source code it produced for versions 9.3.0.9, 10.6, and 11.6 of the Software, excluding the “ExampleFileFilter.java” file, any other third party code, and any third party artwork.

INTERROGATORY NO. 27:

Describe with particularity the material Actian contends was excluded from the copyright registrations you contend are infringed, including the “[m]aterial excluded from this claim” identified in the registrations, and the reason for each such exclusion.

RESPONSE:

Actian objects to this Interrogatory as disproportionate to the needs of this case and unduly burdensome and irrelevant. Actian further objects to the Interrogatory to the extent it calls for attorney-client privileged and workproduct information.

Pursuant to Rule 33(d), Actian identifies third party code and artwork for versions 9.3.0.9, 10.6, and 11.6 of the Software, including without limitation the “ExampleFileFilter.java” file, which it excluded from registration on the basis that it does not own the copyright to third-party code or software.

Dkt. 172-5 (Actian’s July 1, 2022 Responses to Plaintiffs’ Interrogatory Nos. 26–27).

The Code Deposits Do Not Match the Supplementary Registrations Because They Contain Previously Published Versions of the Code (Versions 8.12 and 9.2.7.12)

44. Version control dates from the deposits themselves show they contained code from 2006, 2007, and 2008, with no dates later than 2009. *Compare* Dkt. 170-14 at lines 8, 792, 828, 1366, 2626 (redacted Engine deposit) *with* Dkt. 174-8 at same lines (unredacted Engine deposit showing dates “2006,” “2007,” “2009/02/12” and “2008/05/20”); *compare* Dkt. 170-16 at lines 128, 210, 898 (redacted UI deposit) *with* Dkt. 174-9 at same lines (unredacted UI deposit showing dates “2008/03/25,” “2008/09/17” and “2008/03/14”); *see also* Dkt. 174-7 (Van Dyken Tr.) at 167:01–169:12, 170:16–171:08.

45. The 2006 code is likely from Version 8.12 of the Software. Dkt. 170-10 (Ex. 10 to Plaintiff’s Mot. to Refer) at ACTIAN_004508 (Chart of DI versions showing v. 8.12 first shipped September 2006).

46. Version 8.12 of the Software is covered by a separate copyright registration (Copyright Registration Nos. TX0009058230 (engine) and TX0009058232 (UI)). Exs. B and C to this Motion at ACTIAN_004428 (DI 8.12 engine) and ACTIAN_004430 (DI 8.12 DI 8.12 UI).

47. Copyright Registration No. TX0009058230 is a certificate for a computer program titled “Data Integrator 8.12 Engine;” Copyright Registration No. TX0009058232 is a certificate for a computer program titled “Data Integrator 8.12 UI.” Exs. B and C to this Motion at ACTIAN_004428 (DI 8.12 engine) and ACTIAN_004430 (DI 8.12 DI 8.12 UI).

48. Copyright Registration No. TX0009058230 states that the computer program was first published on Sept. 20, 2006. Ex. B to this Motion at ACTIAN_004428.

49. Copyright Registration No. TX0009058232 states that the computer program was first published on Sept. 20, 2006. Ex. C to this Motion at ACTIAN_004430.

50. Indeed, VDS purchased and received Version 8.12 of the Software from Pervasive Software, Inc. on December 27, 2006. Dkt. 91 (Actian’s Second Amended Counterclaims) ¶ 38, Ex. F.

51. The deposit also contains source code from Version 9.2.7.12 of the Software. Dkt. 174-12 (HelfinSiegel Rep.) at 19–20. Data Integrator version 9.2.7.12 is Actian’s internal build version of Data Integrator product version 9.2.7.10. *Id.* at 13.

52. Actian’s own expert, Mr. HelfinSiegel, asserts that the great majority of the 9.3.0.9 Engine source code is identical to [the] 9.2.7.12 Engine code, and more than one-half of the 9.3.0.9 UI source code is identical to 9.2.7.12 UI code. Dkt. 174-12 (HelfinSiegel Rep.) at 18–20. (See report for specific percentages).

53. Mr. HelfinSiegel also concludes that DI 9.2.7.12 and 9.3.0.9 are quantitatively and qualitatively similar. Dkt. 174-12 (HelfinSiegel Rep.) at 19–20, 23.

54. Version 9.2.7.12 of the Software was published and sold in 2011. Ex. D to this Motion (Excerpt of Actian's July 1, 2022 Supplemental Responses to Interrogatories Nos. 1-30 at First Supplemental Response) at ROG 9.

55. VDS purchased and received a license to Version 9.2.7.12 of the Software from Actian on Jan. 20, 2011. *See id.*

The Source Code Deposits Do Not Match the Supplementary Registrations Because They Contain Third-Party Code

56. The deposits include Java code from third-party Sun, such as "ExampleFileFilter.java." Dkt. 172-5 (Actian's responses to Plaintiffs' Interrogatory Nos. 26-27).

57. The deposits include Java code from third-party Sun, such as "PvswFileFilter.java." D174-6 (Martin 2nd Supp. Rep.) at 2, 5-10.

58. Actian redacted a copyright notice that attributes the code to Sun in the deposit. D174-6 (Martin 2nd Supp. Rep.) at 2, 5-10.

The Code Deposits Do Not Match the Supplementary Registrations Because They Are Not Representative

59. Plaintiffs' expert, Mr. Martin, opined that the DI 9.x Engine deposit contains duplicates of other portions of the deposit. Dkt. 174-5 (Martin 1st Supp. Rep.) at 6-7.

60. He explained that the DI 9.x UI deposit includes printouts for three files written in a different programming language than the majority of the code. Dkt. 174-5 (Martin 1st Supp. Rep.) at 6-7.

61. Mr. Martin also opined that the printouts appear functionally unrelated to the registered program. Dkt. 174-5 (Martin 1st Supp. Rep.) at 11.

Dated: January 26, 2023

Respectfully submitted,

/s/ Danielle J. Healey

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